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No. 07-1504

Supreme Court, U.S.
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In The Supreme Court of the United States

SCOT HOLLONBECK, et al.,

Petitioners,

v.

UNITED STATES OLYMPIC COMMITTEE,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

REPLY BRIEF FOR PETITIONERS

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I. THE SOLICITOR GENERAL SHOULD BE INVITED TO FILE A BRIEF EXPRESSING THE VIEWS OF THE UNITED STATES

The Rehabilitation Act assigns to the executive branch a central role in the interpretation of section 504. Section 504(a) requires each federal agency that provides federal assistance to issue regulations implementing the Rehabilitation Act, and mandates submission of those regulations to the appropriate authorizing committees of Congress.[1] Because the substantive requirement of the statute itself is set out in a single word ("discrimination"), delineating what constitutes "discrimination against the handicapped continues to be an important responsibility" of those federal agencies. *Southeastern Community College v. Davis*, 442 U.S. 397, 413 (1979).

In construing section 504 this Court has repeatedly relied on section 504 regulations,[2] and has at times looked as well at regulations under similarly phrased federal anti-discrimination statutes.[3] In the instant case the significance of the various federal

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[1] 29 U.S.C. § 794(a).

[2] *United States Dept. of Transp. v. Paralyzed Veterans of America*, 477 U.S. 597, 612 n.14 (1986); *Alexander v. Choate*, 469 U.S. 287, 297 n.17, 304-05 (1985); *Consolidated Rail Corporation v. Darrone*, 465 U.S. 624, 633-34 (1984); *Southeastern Community College v. Davis*, 442 U.S. at 406, 412.

[3] *Alexander v. Choate*, 469 U.S. at 294 n.11; *United States Department of Transportation v. Paralyzed Veterans of America*, 477 U.S. at 612 n.14.

anti-discrimination regulations is a matter of dispute. In light of the substantial importance of those regulations to the question presented, the Solicitor General should be invited to file a brief expressing the views of the United States.

Petitioner has consistently urged that section 504 should be construed in light of the Title IX regulations. Not only is the language of Title IX and section 504 identical,[4] but the Title IX regulations expressly deal in detail with the very issue in this case – how the anti-discrimination requirement should apply where a recipient supports separate athletic teams because of differences in the physical capacities of the athletes involved. Respondent objects that the protections now accorded by federal law to girls' and women's sports programs derive, not from the text of Title IX, but from "detailed *regulations* issued by the Department of Education." (Br.Opp. 24-25; emphasis in original). But that is precisely the point; because the text of Title IX and section 504 are the same, the regulations under one can be instructive as to the meaning of the other.

The USOC suggests that the type of preferential treatment it accords to Olympic and Pan American Game athletes would be permissible under the Title IX regulations. (Br.Opp. 25). It relies on a Title IX

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[4] See S. Rep. No. 93-1297, *reprinted in* 1974 U.S.C.C.A.N. 6373, 6390 (section 504 was "patterned after and is almost identical to the anti-discrimination language of" Title IX).

regulation stating in part that "[u]nequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams ... will not constitute non-compliance with this section." 34 C.F.R. § 106.41(c). But the quoted language merely states that such inequality is not a per se violation; the remainder of the provision, not quoted by respondent, makes clear that such a disparity could be "consider[ed] ... in assessing equality of opportunity for members of each sex." *Id.* Section 106.41(c) explains that although no single type of disparity – e.g., unequal "equipment and supplies" – is a per se violation, all such differences are assessed in combination in determining whether a recipient has provided "equal athletic opportunity for members of both sexes."

Respondent argues that "the Department[ ] of ... Health and Human Services ... [has] *never* promulgated any [section 504] regulations that even hint at a Title IX-like framework." (Br.Opp. 25; emphasis in original). To the contrary, the Department of Health and Human Services has adopted just such a section 504 regulation. A recipient may administer a scholarship or other form of financial assistance

> on the basis of factors that ... have the effect of discriminating on the basis of handicap only if the overall effect of the award of scholarships, fellowships, and other forms of financial assistance is not discriminatory on the basis of handicap.

45 C.F.R. § 84.46(a)(2). This section 504 regulation regarding scholarships is essentially identical to the Title IX regulations regarding such financial assistance. See 34 C.F.R. § 106.37(b)(1).

Respondent urges that section 504 should be interpreted in light of an EEOC Policy Guidance regarding Title I of the ADA. (Br.Opp. 18-19). The USOC practice of limiting grants and tuition assistance to the Olympic and Pan American Games athletes, it contends, is "exactly" like a regular retirement plan which provides greater benefits than a disability retirement plan. (Br.Opp. 18-19). To the contrary, the analogous pension plan would be one which provides special higher pensions limited to retirees who had at one time been members of the United States Olympic Team. That type of pension plan would assuredly violate the EEOC ADA regulations, which expressly forbid employment practices with such a discriminatory effect. 29 C.F.R. § 1630.7. The text of the ADA, moreover, makes clear that only Title II of that statute (regarding state and local governments), not the employment provisions of Title I (at issue in the EEOC guidance), must be construed in a manner consistent with section 504. See 42 U.S.C. § 12134(b).

If the USOC provided general support for all athletes seeking to represent the United States at any of the major international competitions covered by the USOC charter, the USOC could not administer that assistance on a case-by-case basis in a manner that had the purpose or the effect of discriminating

against disabled Paralympic athletes. 28 C.F.R. § 41.51(b)(3)(1). The USOC's core argument is that it has avoided any obligations under section 504 by the way in which it has defined the benefits it provides. The USOC "Athlete Support Program" is not an athlete-support-program, but an "Athlete-competing-in-the-Olympics-or-Pan-American-Games" Support Program. The benefit at the USOC Training Center is a "Training-for-Paralympic-athletes-so-long-as-no-Olympic-or-Pan-American-Games-athlete-wants-to-use-the-facility" Center. The United States, however, has concluded, in a brief filed in this Court, that a recipient of federal funds may not avoid compliance with section 504 simply by incorporating otherwise impermissible limitations into the definition of the benefit being provided.

> One can conceive of the benefit being distributed ... [at] a rampless library ... as ... "books-in-a-building-without-ramps," and [a recipient then arguing] that *that* service is available equally to all .... [But] [a]ntidiscrimination legislation can obviously be emptied of meaning if every discriminatory policy is "collapsed" into one's definition of what is the relevant benefit.

Brief for the United States, *Alexander v. Choate*, 469 U.S. 287 (1985), at 28. This Court expressly quoted and adopted the government's interpretation of section 504. 469 U.S. at 301 n.21.

It would for several reasons be appropriate to invite the Solicitor General to file a brief expressing

the views of the United States. The United States has a substantial interest in the proper interpretation of section 504 and its implementing regulations, both of which are enforced by several dozen federal agencies.[5] The resolution of the instant case turns to a significant degree on the interpretation of the regulations implementing section 504 and other federal anti-discrimination laws; the government's interpretation of its own regulations is properly accorded substantial weight. *Auer v. Robbins*, 519 U.S. 452, 461 (1997). Executive Order 11250 confers upon the Attorney General responsibility for overseeing and coordinating all federal regulations implementing section 504, Title IX, and Title VI. Because the role of American teams in major international competitions at times has significant foreign policy implications, a consideration which may have prompted Congress to charter the USOC in the first place, an expression of the views of the United States regarding this particular controversy would be especially appropriate.

The USOC insists that it would be impractical to administer a rule forbidding discrimination against Paralympic athletes. The Department of Education, however, has extensive experience with the closely

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[5] In briefs filed with this Court, the United States has repeatedly emphasized its interest in the interpretation of section 504 and its implementing regulations. E.g., Brief for the United States as Amicus Curiae, *Barnes v. Gorman*, 536 U.S. 181 (2002), No. 01-682, at 1.

analogous problem of guaranteeing equal athletic opportunity to members of girls' and women's teams.[6] The government's views regarding this intensely practical issue would thus be of obvious relevance.

II. THE ISSUES PRESENTED ARE SUBSTANTIAL

Respondent suggests that the question presented is insubstantial because the majority opinion in the court below characterized the claim in this case as "push[ing] the margins of federal disability discrimination laws." (Br.Opp. 1; Pet. App. 22a). The dissenting opinion, on the other hand, insisted that the actions of the USOC were an obvious violation of section 504; "[w]hat the statute forbids is exactly what has occurred and is occurring here." (Pet. App. 15a). The rhetorical force of these conflicting opinions attests, not to the clarity of the issue, but only to its importance.

Respondent acknowledges that under *Alexander v. Choate* a recipient cannot define its benefit "in a way that effectively denies otherwise qualified handicapped individuals the meaningful access to which they are entitled." 469 U.S. at 301 (Br.Opp. 26). The

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[6] See Title IX and Intercollegiate Athletics Policy Interpretation, 44 Fed. Reg. 71413 (1979); Clarification of Intercollegiate Athletics Policy guidance: The Three-Part Test (1996), http://www.ed/gov/about/offices/list/ocr/docs/clarific.html

USOC nonetheless insists that it is in compliance with the interpretation of section 504 set out in *Choate* because

> [t]here is but one criterion for gaining access to that benefit: the individual must be eligible to represent the United States at the Olympic Games.... [T]he ... eligibility criterion is "neutral on its face ...." ... *Choate*, 469 U.S. at 302.

(Br.Opp. 26). Respondent's quotation from *Choate*, however, omits the beginning of the sentence, in which the Court emphasized that the practice in that case also did not involve "criteria that have a particular exclusionary effect on the handicapped." 469 U.S. at 302. Such an exclusionary effect, also prohibited by the Department of Justice section 504 coordinating regulations,[7] is precisely the consequence of the criterion at issue in this case. *Choate* does not permit a recipient to utilize any criterion so long as it is "neutral on its face"; the criterion is also subject to challenge if it denies "meaningful access." The criterion at issue – eligibility to represent the United States in the Olympics – has not been satisfied by

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[7] The Department of Justice section 504 coordinating regulations provide that "[a] recipient may not ... utilize criteria ... [t]hat have the effect of subjecting qualified handicapped persons to discrimination on the basis of handicap." 28 C.F.R. § 41.51(b)(3). All federal agencies are required to issue and enforce regulations "consistent with" this provision. 28 C.F.R. § 41.4(a).

any disabled athlete since 2000. (Br.Opp. 7-8). Near total exclusion cannot constitute meaningful access.[8]

Respondent agrees that section 504 would forbid a recipient from allocating benefits between its programs if it acted out of discriminatory *purpose*. The USOC maintains, however, that it did not act with any "discriminatory animus" toward disabled athletes, and has no "history of *de jure* segregation." (Br.Opp. 29, 30 n.5). The forms of discriminatory motive forbidden by section 504, however, are not limited to outright antipathy towards the disabled. In enacting section 504, Congress concluded that purposeful discrimination was "most often the product, not of invidious animus, but rather of thoughtlessness and indifference – of benign neglect." *Alexander v. Choate*, 469 U.S. 287, 295 (1985).

Respondent recognizes that under section 504 it could not engage in practices that had the effect of favoring able-bodied over disabled athletes who were in "a single program." (Br.Opp. 23). The USOC describes its mission as "promot[ing] the *overall* standing of the United States in these international competitions" (Br.Opp. 3; emphasis added), referring

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[8] Respondent represents that since this case was considered in the district court there have been some changes in degree to which benefits are provided to Paralympic athletes. (Br.Opp. 5 n.3). Respondent makes no assertion as to the level of those benefits or the numbers of Paralympic athletes who have ever received them, and does not contend that any such changes are permanent or have rendered this case moot.

to the Olympic Games, the Paralympic Games, and the Pan American Games. *Id.* Respondent insists, however, that for the purposes of section 504 its support of athletes in the Olympics, of athletes in the Paralympics and of athletes in the Pan American games are all "different programs." (Br.Opp. i, 2, 14). Traditional basketball and Paralympic basketball, respondent argues, are "different program[s] designed for different athletes competing ... at different competitions." (Br.Opp. 14). But precisely the same thing could be said about a university's men's and women's basketball teams. Respondent does not explain why such differences are legally irrelevant under Title IX, but yet somehow dispositive of the instant claim under the identically worded language of section 504.

III. THE UNIQUE IMPORTANCE AND RESPONSIBILITIES OF THE UNITED STATES OLYMPIC COMMITTEE WARRANT REVIEW OF THE QUESTION PRESENTED

In *National Collegiate Athletic Association v. Smith*, 525 U.S. 459 (1999), the petitioner persuasively argued in support of certiorari that the question of whether the NCAA is subject to Title IX was "exceptionally important solely as it pertains to the NCAA, the organization charged with the 'critical

role' of regulating intercollegiate athletics."[9] The United States Olympic Committee plays an equally critical role in the participation of American athletes in international competitions; whether section 504 applies to the USOC in a meaningful manner is of similarly exceptional import. The United States Olympic Committee is a unique American institution, chartered by Congress for the very purpose of representing the interests of the nation in the international arena. The USOC's successes have been matters of national acclaim and its failures have properly been matters of concern to the federal government and to the American public.

The USOC's treatment of Paralympic athletes, which the district judge aptly characterized as "relegat[ing] Paralympians to second class status" (Pet. App. 47a), offends the very purpose of the Paralympics, and of the congressional decision to confer on the USOC responsibility for overseeing American participation in those games. The symbolism of that unequal treatment sends the worst possible message to Americans with disabilities, athletes as well as non-athletes. See *Brown v. Board of Education*, 347 U.S. 483, 494 (1954). For Paralympic athletes, the denial of financial support from the USOC is particularly serious. Those athletes cannot expect to benefit from lucrative endorsement contracts, rarely have

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[9] Petition for Writ of Certiorari, No. 98-84, at 2.

collegiate sports programs to rely on, and cannot look forward to the possibility of making a living as coaches or professional athletes.

Counsel for respondent emphasizes that the USOC, in its commitment to equal opportunity, permits paraplegic athletes as well as the able-bodied to compete for the financial assistance available to those who excel at the 400 meter hurdles, the high jump, or the pole vault. (Br.Opp. 13, 19). Paralympic athletes might understandably regard that proffered opportunity as an empty gesture.

It is not the case that United States Paralympic athletes, despite the practices at issue in this case, have been more successful than our Olympic athletes. At the 2006 winter games the United States Olympic Team won 10% of the medals, and ranked second; the Paralympic Team won 7% of the medals, and ranked seventh. At the 2004 summer games the United States Olympic Team won 11% of the medals and ranked first; the Paralympic Team won 6% of the medals and ranked fourth. The data relied on by respondent, estimating the proportion of athletes who won medals, is misleading, because the number of Paralympic competitors is far smaller than the number of Olympic competitors.[10]

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[10] For example, at the 2006 Winter Olympics 2508 athletes competed for 252 medals. At the 2006 Paralympics, which awarded 174 medals, there were only 477 athletes. Detailed

(Continued on following page)

Judicial understanding of the problem posed by this case will not be improved by further litigation against other defendants. There is, after all, but a single United States Olympic Committee. There is little likelihood that any subsequent section 504 lawsuits against the USOC itself would add anything, particularly since such claims would have to be brought in (or likely would be transferred to) the Tenth Circuit, where under the decision below those claims would promptly be dismissed without discovery or other substantive proceedings. This case is not merely a good vehicle for assessing the legality of the USOC's policies; it may, as a practical matter, be the only vehicle for doing so.

Respondent argues that judicial enforcement of section 504 against the USOC is unnecessary because the USOC regularly submits reports to both Houses of Congress detailing its efforts with regard to disabled individuals. (Br.Opp. 33). Certiorari assertedly is unwarranted because Congress already "carefully monitors and assesses the opportunities for disabled individuals in amateur athletics." *Id.* The USOC does not, however, contend that it ever disclosed to Congress in those reports any of the discriminatory practices at issue in the instant litigation.

In light of the unique national role and responsibilities of the United States Olympic Committee, and

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data regarding the Olympic and Paralympic Games is set out in an Appendix to the reply brief.

the compelling arguments against the legality of its practices, it is hardly surprising that six members of the Tenth Circuit Court of Appeals concluded that rehearing en banc was warranted. In the present posture of this litigation, the USOC has prevailed essentially by chance, because of the randomly chosen composition of the particular appellate panel whose decision remained in effect only because the circuit as a whole was evenly divided. A legal issue of such palpable national importance should not be resolved by sheer caprice.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Tenth Circuit. In the alternative, the Solicitor General should be invited to file a brief expressing the views of the United States.

Respectfully submitted,

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Best Available Copy

s and US Medals	URL for Number of Athletes
/games/past/table_ 1996	http://www.olympic.org/uk/games/past/ index_uk.asp?OLGT=1&OLGY=1996
/games/past/table_ 1998	http://www.olympic.org/uk/games/past/ index_uk.asp?OLGT=2&OLGY=1998
/games/past/table_ 2000	http://www.olympic.org/uk/games/past/ index_uk.asp?OLGT=1&OLGY=2000
/games/past/table_ 2002	http://www.olympic.org/uk/games/past/ index_uk.asp?OLGT=2&OLGY=2002
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/games/past/table_ 2006	http://www.olympic.org/uk/games/past/ index_uk.asp?OLGT=2&OLGY=2006
lease/Main_Sections_ mpics_reports.html? es=1996PG	http://www.paralympic.org/release/Main_ Sections_Menu/Paralympic_Games/Past_ Games/Summer_Games_Overview.html
lease/Main_Sections_ mpics_reports.html? es=1998PWG	http://www.paralympic.org/release/Main_ Sections_Menu/Paralympic_Games/Past_ Games/Winter_Games_Overview.html
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lease/Main_Sections_ mpics_reports.html? es=2006PWG	http://www.paralympic.org/release/Main_ Sections_Menu/Paralympic_Games/Past_ Games/Winter_Games_Overview.html
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2007_Pan_American	